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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MUSCLETECH RESEARCH AND
DEVELOPMENT, INC.,

H026882

Plaintiff and Appellant,

(Santa Clara County
Superior Court
No. 1-03 CV005110)

v.

ZURICH NORTH AMERICA, et al.,

Defendants and Respondents.

/

The superior court dismissed on forum non conveniens grounds a lawsuit brought by plaintiff MuscleTech Research and Development, Inc. (MuscleTech) against defendants Zurich Insurance Company of Canada (ZICC) and Zurich American Insurance Company (ZAIC). MuscleTech's lawsuit alleged that ZICC breached its contractual obligations to defend and indemnify MuscleTech under insurance policies issued by ZICC. On appeal, MuscleTech claims that the superior court erred as a matter of law in finding that ZICC and ZAIC had met their burden of showing that there was another suitable forum in which both ZICC and ZAIC were subject to jurisdiction. We agree and reverse.

I. Background

On September 15, 2003, MuscleTech filed a complaint in Santa Clara County Superior Court against ZICC, “Zurich North America” and numerous Doe defendants. The complaint alleged that ZICC and Zurich North America had breached their contractual obligations to defend and indemnify MuscleTech under “occurrence-based” insurance policies issued by them. The complaint sought both damages and declaratory relief based on the alleged breach of contract. No allegations were made regarding the Doe defendants.

The complaint acknowledged that both MuscleTech and ZICC had their principal places of business in Ontario, Canada. MuscleTech alleged, on information and belief, that “Zurich North America is a foreign corporation with its principal place of business in Sch[a]umburg, Illinois. . . . At various relevant times Zurich North America has had substantial, if not principal responsibility in the adjustment and handling of MuscleTech’s claims, including retaining, paying and monitoring defense counsel to defend MuscleTech in various underlying lawsuits.”

The insurance policies in question were attached to the complaint.¹ ZICC had issued primary, umbrella and excess umbrella policies to MuscleTech for the period from May 15, 1999 to June 1, 2000 and then renewed those policies through June 1, 2001.² These policies provided that they applied to claims against MuscleTech in both Canada and the United States. Each policy included a section

¹ In addition to the “occurrence” policies, MuscleTech also attached an “Indemnity Agreement” between ZICC and MuscleTech. This agreement provided that it “shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein unless specifically stated otherwise.”

² ZICC had also allegedly issued a separate “occurrence-based” policy on May 31, 2001 that provided coverage from June 1, 2001 to June 15, 2001 and thereafter issued an extension of that policy for one additional week.

called “Standard Mortgage Clause; Statutory Conditions.” This section stated: “The STATUTORY CONDITIONS and ADDITIONAL CONDITIONS apply with respect to all the perils insured by the Policy and to the liability coverage, where provided, except where these conditions may be modified or supplemented by riders or endorsements attached.” The following proviso appeared under the title “*General Conditions*” in this section: “This policy is subject to the Civil Code of the Province of Quebec.”

On September 23, 2003, MuscleTech filed an amended complaint to which the policies were also attached. The amended complaint alleged additional causes of action for breach of the implied covenant of good faith and fair dealing, negligence and constructive fraud. The amended complaint further specified that it was Zurich North America’s “Mass Torts Claims Handling Division located in Sch[a]umburg, Illinois” that was responsible for handling MuscleTech’s claims. Like the original complaint, the amended complaint did not make any allegations against the Doe defendants.

On October 1, 2003, ZICC filed a motion to dismiss the action “on the ground that California is an inconvenient forum for this action.” In its motion, ZICC noted that “Zurich North America” was “merely a trade name with no capacity to sue or be sued.” ZICC acknowledged that “an entity known variably as ‘Zurich’ operates in the United States, [but] that entity and [ZICC] are . . . entirely separate legal entities.” ZICC attached to its motion a copy of a claim that it had filed in Ontario Superior Court against MuscleTech on August 19, 2003 seeking declaratory relief in regard to the same insurance policies upon which MuscleTech’s action was based.

The superior court granted MuscleTech’s request for a continuance of the hearing on ZICC’s motion so that it could conduct discovery including previously

noticed depositions. The court's order stated "Questions to be limited to issues of forum non conveniens."

Pursuant to the parties' stipulation, the court granted MuscleTech leave "to identify [ZAIC] as DOE 1 to Plaintiff's First Amended Complaint, as reflected in Exhibit A." "Exhibit A" does not appear in our record. It appears from subsequent pleadings that the only change to the amended complaint was to include ZAIC in the title of the case. No allegations regarding ZAIC were added to the amended complaint. ZAIC thereafter joined ZICC's motion to dismiss and adopted all of ZICC's briefing.

ZICC submitted the declaration of Susan Watts, its senior vice-president for claims, in support of its motion. She declared that ZICC was "a Swiss Company with business operations in Toronto, Ontario, Canada" and "has no California offices and no offices anywhere in the United States." The insurance policies in question had been negotiated and entered into in Ontario, Canada. All of ZICC's documentation regarding MuscleTech's claims was located in Canada.

At her deposition, Watts stated that she had "ultimate responsibility" for MuscleTech's claims and that those claims were being handled in Toronto. All of the documents relating to the MuscleTech claims were located in Toronto, and ZICC's Toronto office was responsible for the MuscleTech claims. All of ZICC's employees were located in Toronto, Ontario, Canada. ZICC "retained" ZAIC "to perform administrative consulting services for some of the MuscleTech claims and all of the persons who performed such services were located in Schaumburg, Illinois." The only California lawsuit tendered to ZICC was the Santa Clara County action, and it had been tendered directly to ZICC in Toronto, Ontario, Canada. ZAIC had never been involved in handling that claim. ZICC had accepted coverage as to the Santa Clara County lawsuit and retained counsel to

defend MuscleTech in the Santa Clara County action. ZICC had not retained any lawyers to represent MuscleTech in any California class-action lawsuit.

In opposition to the motion, MuscleTech asserted that ZAIC was not amenable to jurisdiction in Canada and had substantial contacts with California including nine California offices. ZAIC employee Julie Stern testified at her deposition that she and two other ZAIC employees had been involved in assisting ZICC in handling MuscleTech's claims. Stern explained that ZAIC was "simply a resource" for ZICC. "[T]hey would ask us for things, and we would provide that to them as a resource, but all the responsibilities were [ZICC]'s. They issued the policy." "We would do whatever [ZICC] would ask us to do, but [ZICC] had the ultimate authority and decision-making power and responsibility for everything." When ZICC told ZAIC that it no longer required its assistance, Stern sent ZAIC's MuscleTech file to ZICC.

MuscleTech asserted that products liability lawsuits were pending against it in the United States in Pennsylvania, Florida, Louisiana, Tennessee, Oklahoma, Kentucky, New Jersey and California. The California products liability lawsuit was venued in Santa Clara County.³ Three products liability lawsuits were pending in Pennsylvania. Class action lawsuits were pending against MuscleTech in Illinois, Wisconsin, Missouri, New York and Florida. Two class action lawsuits were pending in New York. MuscleTech had received notice from an attorney that a similar class action suit would soon be brought in California.⁴

³ At MuscleTech's request, we have taken judicial notice of the fact that a second California products liability lawsuit was filed against it in May 2004 in Orange County.

⁴ At MuscleTech's request, we have taken judicial notice of the fact that a California class action lawsuit was filed against it in February 2004 in Contra Costa County.

MuscleTech's "national counsel" declared: "Throughout much of the relevant time period, Patty Nuccio, Esquire, in Schaumburg, Illinois, was my point-of-contact at Zurich on MuscleTech claims. I believe that she also served as Zurich's principal contact person for Zurich's appointed counsel."

MuscleTech produced evidence that the substantive laws of California and Ontario were "materially identical," but the procedural laws of the two jurisdictions were substantially different. It could be difficult in Ontario to depose or subpoena a non-resident non-party.

At the November 20, 2003 hearing on the motion, MuscleTech's attorney argued that the locations of the products liability and class action lawsuits against MuscleTech were more important than the residences of the parties to this coverage dispute or the location where the insurance contracts had been negotiated and executed. The attorney for ZAIC and ZICC maintained that the question of whether ZAIC could be sued in Canada was irrelevant because ZAIC was "a sham defendant" as ZAIC was "not a party to the contract."

The court noted that many of the potential witnesses were actually closer to Toronto because they were located on the East Coast and that access to Toronto from the United States was fairly straightforward. The court asserted that "[e]ven if the sham defendant issue is taken out of this, under forum non conveniens, isn't this better litigated somewhere else?" It granted the motion to dismiss.

The court's written order noted that MuscleTech was not a California resident and therefore the case could be dismissed if ZAIC and ZICC showed that there was a suitable alternative forum and the balance of private and public interest factors favored the alternative forum. The written order acknowledged that dismissal would only be appropriate if the balance was "strongly in favor" of the alternative forum. The court accepted the assertion that ZAIC was a sham defendant and found that ZAIC "was added as a response to this motion" and

“[t]here is no allegation that [ZAIC] had any contract with MuscleTech.” The written order did not otherwise explain the court’s reasoning. MuscleTech filed a timely notice of appeal.

II. Analysis

“A defendant . . . may serve and file a notice of motion for one or more of the following purposes: . . . To stay or dismiss the action on the ground of inconvenient forum.” (Code Civ. Proc., § 418.10, subd. (a).) “When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.” (Code Civ. Proc., § 410.30, subd. (a).)

“Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.” (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) “In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a ‘suitable’ place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California.” (*Stangvik* at p. 751.) “On a motion for forum non conveniens, the defendant, as the moving party, bears the burden of proof.” (*Stangvik* at p. 751.)

“The availability of a suitable alternative forum for the action is critical.” (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 435 (*American Cemwood*).) “[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff. Because of . . . [this] factor, the suit will be entertained, no matter how inappropriate the

forum may be, if the defendant cannot be subjected to jurisdiction in other states [or foreign jurisdictions].” (Stangvik at p. 752, citations omitted.) “[T]he doctrine of forum non conveniens presupposes the existence of at least two forums in which *all* defendants are amenable to process.” (*American Cemwood* at p. 438, citation and quotation marks omitted, emphasis added.)

Because the suitability of a forum depends solely on the forum’s jurisdiction over the parties and the absence of any statute of limitations bar to resolution of the dispute on the merits in that forum, a trial court’s decision that another forum is suitable, unlike its balancing of interests, is not a discretionary decision entitled to any deference on appeal. (*American Cemwood* at p. 436.) Thus, we exercise de novo review over the superior court’s implied finding that there was a “suitable alternative forum” in which both ZAIC and ZICC were subject to the alternative forum’s jurisdiction.

ZAIC and ZICC bore the burden of proof on this issue, and they made no effort to demonstrate that there were any other forums in which *both* ZAIC and ZICC were subject to the forum’s jurisdiction. ZICC was clearly subject to the jurisdiction of the Ontario, Canada court, and there are indications in the record that ZAIC was subject to the jurisdiction of Illinois courts. However, there is no evidence in the record that ZAIC was subject to the Ontario, Canada court’s jurisdiction or that ZICC was subject to the jurisdiction of any courts other than those in Ontario, Canada and California.

ZICC and ZAIC instead asserted that it was not necessary for them to show that ZAIC was subject to the jurisdiction of the Ontario, Canada court because ZAIC was a “sham defendant” against whom MuscleTech had asserted no causes of action in its amended complaint.

It is clear that MuscleTech made a pleading error when it substituted ZAIC for Doe 1 and failed to include ZAIC in the amended complaint’s allegations

against Zurich North America and ZICC. Yet we refuse to accept the assertion of ZICC and ZAIC that this readily correctable pleading error relieved them of their burden of showing that *all defendants* were subject to the jurisdiction of an alternate forum.

The superior court erred in finding that ZAIC was added as a defendant in response to the forum non conveniens motion. MuscleTech's original complaint alleged all of the causes of action against "Zurich North America," and the original complaint's description of that entity were more than specific enough to identify that entity as ZAIC. The reasonableness of MuscleTech's error in believing that ZAIC was called "Zurich North America" is amply demonstrated in the record by ZAIC's repeated references to itself as Zurich North America. In this context, it is clear that MuscleTech always intended to sue ZAIC for its participation in handling the insurance claims and did not add ZAIC as a "sham defendant" in response to the forum non conveniens motion.

MuscleTech's pleading error in substituting ZAIC for Doe 1 without also including ZAIC in the allegations against Zurich North America does not substantively change the nature of MuscleTech's lawsuit and does not excuse ZICC and ZAIC from satisfying their burden of proof on their motion.

It follows that the motion could not succeed. "A rule permitting a stay or dismissal of an action over which no single alternative court could exercise jurisdiction would force the plaintiff to pursue separate actions in multiple states or countries to obtain complete relief. Such a rule, by encouraging piecemeal litigation and blossoming numbers of actions in multiple jurisdictions, would threaten precisely those considerations of convenience, economy and justice the doctrine was designed to bolster." (*American Cemwood* at pp. 438-439.)

ZICC and ZAIC urge us to examine the merits of MuscleTech's lawsuit and determine that MuscleTech could not possibly succeed on its claims against ZAIC.

We decline to do so. The question of whether ZAIC can be held liable to MuscleTech for its actions in handling some of MuscleTech's insurance claims on behalf of ZICC is not a question that we may resolve on a forum non conveniens motion. ZAIC may seek resolution of that question by filing a demurrer or a summary judgment motion.

The superior court erred in dismissing this case on forum non conveniens grounds in the absence of proof that there was a suitable alternative forum in which both ZICC and ZAIC were subject to jurisdiction.

III. Disposition

The judgment is reversed. MuscleTech shall recover its appellate costs.

Mihara, J.

WE CONCUR:

Rushing, P.J.

Elia, J.